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In The

Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government's brief illustrates the dangers of common-law crimes. A personal benefit test that extends beyond pecuniary gain presents vagueness dangers, so the government asks the Court to refashion the judge-created tipping crime by replacing the personal benefit element with a broader "lack of corporate purpose" requirement. The government invites the Court to create this new rule long after Petitioner acted, thus ensuring that he had no notice of the proposed retroactive judicial expansion of the crime.

This Court barred common-law crime creation 200 years ago to avoid precisely this sort of after-the-fact judicial enlargement of crimes and to preserve the proper roles of the legislative and judicial branches. If the Court elects to preserve the crime of insider trading without legislation expressly authorizing and defining the offense—and the government's brief underscores the reasons to discard the judge-created offense—it should narrowly construe *Dirks*. Properly read, *Dirks* requires that the insider sought a pecuniary benefit. Because Maher Kara never sought any such benefit, as the district court and the SEC both found, Petitioner's conviction cannot stand.

I. THE GOVERNMENT'S RADICALLY EXPANDED DEFINITION IS BARRED BY THE COURT'S PRECEDENTS

The government proposes to rewrite, and vastly expand, the insider trading crime and replace *Dirks* with an entirely new theory of tippee liability. It wants to criminalize far more conduct than even the Ninth Circuit's test purports to capture. For the first time in its merits brief, the government maintains that the Court's "personal benefit" requirement can be satisfied *without proof of any benefit whatsoever*—pecuniary, tangible, or even psychic or emotional. The government would replace *Dirks*' "personal benefit" test with a "lack of corporate purpose" test: knowingly trading on material nonpublic information would be criminal whenever an insider disclosed the information "for personal, rather than corporate, reasons." U.S.Br.18.

This is not the law. The government's argument is foreclosed by this Court's precedents and has no basis in the language or legislative history of §10(b). The government has abandoned the Ninth Circuit's test because it is unconstitutionally vague. It now seeks instead to vastly expand tippee liability and institute the *de facto* parity-of-information rule this Court has repeatedly rejected.

A. The Government's Position Is Squarely At Odds With *Dirks*

1. The *Dirks* Court did not hold that tipping liability under §10(b) depends on whether the insider had a corporate purpose for making his disclosure. The Court unequivocally described its test in terms of personal gain and benefit: "[T]he test is whether the insider personally *will benefit*, directly or indirectly, from his disclosure. Absent some *personal gain*, there has been no breach of duty to stockholders." 463 U.S. at 662 (emphasis added).

The Court also held that mere lack of a corporate purpose is insufficient to trigger tipping-and-trading liability under §10(b). The only "purpose" that can transform a disclosure of confidential information into criminal securities fraud is the insider's pursuit of "personal gain." *Id.* at 659. Insiders may not "personally us[e] undisclosed corporate information to their *advantage*," and "may not give such information to an outsider for the *same improper purpose* of exploiting the information for their *personal gain*." *Id.* (emphasis added). *Cf. id.* at 668, 671, 673 & n.9 (Blackmun, J., dissenting) (criticizing Court for making "the improper purpose of personal gain" determinative of §10(b) liability).

The Court adopted a *quid pro quo* "theory... that the insider, by giving the information out selectively, is in effect selling the information...for cash, reciprocal information, or other things of value for himself." *Id.* at 663-64 (quotation marks omitted). The Court further held that this personal

gain test depends on "whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings." *Id.* at 663.

The Court emphasized personal gain because, contrary to the government's argument (U.S.Br.18-19), breaching one's fiduciary duty by disclosing confidential corporate information for trading does not—without more—violate §10(b). *Dirks* quoted and reaffirmed *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462, 472-73 (1977), which held that a mere breach of fiduciary duty is insufficient: "Not 'all breaches of fiduciary duty in connection with a securities transaction,'...come within the ambit of Rule 10b–5. There must also be 'manipulation or deception.'" 463 U.S. at 654. The additional factor needed to show that a "tip" is a *fraudulent* breach, *Dirks* explained, is "'where one takes advantage' of 'information intended to be available only for a corporate purpose *and not for the personal benefit* of anyone.'" *Id.* (emphasis added) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 S.E.C. 933, 936 (1968)). The inquiry is not whether the insider lacked a corporate purpose—as would be true with almost any disclosure to someone who might trade—but whether he sought personal gain. Secrist, the insider, did not commit fraud because he "received no direct or indirect personal benefit from the disclosure." *Id.* at 666 n.27.

The Court was articulating a standard for securities "fraud" that could subject people with no duty of confidentiality to the source of the

information to criminal prosecutions and SEC enforcement actions. It intended to capture only the most serious misconduct—to provide a circumscribed "guiding principle" for market participants, not a vague and sweeping measure for liability. *Id.* at 664. Under that principle, a disclosure is a fraudulent breach only when the tipper's motive is pecuniary: An insider can be liable under Rule 10b–5 "only where he fails to disclose material nonpublic information before trading on it and thus makes secret profits." *Id.* at 654 (quotation marks omitted); *see id.* at 666 n.27 ("inside trading for personal gain is fraudulent"). Notably, the motive of the tipper in *Merrill Lynch*, which the Court quoted in defining fraudulent breach, was pecuniary (broker commissions or other compensation), not some intangible benefit. 43 S.E.C. at [*2].

2. The government contends that an insider's disclosure of "material nonpublic information to his 'tippee' with the understanding that it would be used for securities trading purposes" manifests the "deception necessary to establish fraud" and satisfies all elements of a §10(b) violation. U.S.Br.24 (quotation marks omitted). But under this analysis, *Dirks* would have come out the other way, because Secrist disclosed information about the suspected fraud intending that Dirks would "unload" his client's large holdings so that Equity Funding's stock price "would fall precipitously." 463 U.S. at 669 (Blackmun, J., dissenting).

To avoid this flaw in its theory, the government maintains that Secrist had a corporate purpose because his motive was "'to expose the

[corporate] fraud.'" U.S.Br.21 (quoting 463 U.S. at 667), 41 n.8. But instigating a dramatic sell-off caused Equity Funding to go into receivership—hardly a benefit to the shareholders. 463 U.S. at 650. The tip advantaged Dirks' clients, who profited nearly $17 million from "worthless" securities, *Dirks v. SEC*, 681 F.2d 824, 831 (D.C. Cir. 1982), but not the other shareholders who unwittingly purchased or held the worthless stock. This sort of selective disclosure would be a breach of fiduciary duty. *See* Stephen M. Bainbridge, *The Politics of Corporate Governance*, 18 HARV. J.L. & PUB. POL'Y 671, 713 n.210 (1995). Furthermore, Secrist provided the confidential information shortly after Equity Funding had fired him. *Dirks*, 681 F.2d at 829. This suggests that one of his motives was retaliation, and raises the question whether a former manager could have a corporate purpose for such a disclosure.

The *Dirks* Court did not find that Secrist had a corporate purpose; it merely held that Secrist did not receive a personal benefit and thus did not deceive or defraud anyone. 463 U.S. at 666 n.27. *Accord United States v. O'Hagan*, 521 U.S. 642, 663 (1997) (no §10(b) violation in *Dirks* because Secrist did not act for "personal profit").

3. The government contends that the pecuniary gain standard is inconsistent with *Dirks*' "gift" language. U.S.Br.34-35. But *Dirks* clearly held that "personal gain" to the tipper is required and emphasized pecuniary gain. The Court could not have intended to equate "gift" situations in which the tipper receives nothing with personal benefit to the tipper.

The Court introduced these concepts as "facts and circumstances that *often justify...an inference*" of a breach of duty. 463 U.S. at 664 (emphasis added). In other words, they are something less than proof of personal benefit itself, which is how the Court described "pecuniary gain" and "future earnings" in that same paragraph. The Court intended gift and intention-to-benefit situations to be *evidence* that the tipper could be motivated by pecuniary gain, but contemplated that additional evidence would be needed to show the tipper's profit motive. For example, if the tipper owes money to a friend and provides confidential information for trading to the friend in lieu of cash, the gift is evidence that, together with the loan, establishes the tipper's pecuniary benefit motive.[1]

The government's position, by contrast, strips *Dirks*' gift sentence and "personal benefit" discussion of all substance. The government posits that "a gift of information for trading intrinsically involves a personal benefit," U.S.Br.24, and the tipper's reasons for making the gift and relationship to the tippee are irrelevant. *Id.*25, 27-28. If so, why did the Court say that assessing whether personal benefit is established "will not always be easy for courts," 463 U.S. at 664? And why did the Court devote an entire section of its opinion (III.C) to how to apply the test? The government also states that the phrase "trading relative or friend" "did not state a limiting principle." U.S.Br.27. But the Court expressly rejected the

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[1] The government incorrectly assumes that the pecuniary gain test does not capture tips to pay debts or compensation. U.S.Br.25.

SEC's position, because, like the government's here, it *lacked* a "limiting principle." 463 U.S. at 664. The *Dirks* Court crafted a limited personal benefit requirement to cabin the tipping offense, not as a malleable weapon for the government to expand as it sees fit. This Court should interpret that requirement narrowly, as the *Dirks* Court intended.

B. The Government's Position Is Inconsistent With §10(b)'s Text And Legislative History

1. The government contends that "the proscription on insider trading...is drawn directly from the text of Section 10(b)," U.S.Br.46, but points to no §10(b) language about insider trading. None exists. Pet.Br.20-21. By contrast, other countries that prohibit insider trading have enacted statutes with terms such as "insider" and "inside information" that delineate when trading is prohibited.[2]

The absence of relevant statutory language is why "[n]either section 10b nor Rule 10b–5 were cited to regulate insider trading until 1961, [twenty]-

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[2] "The United States stands alone in allowing judges to develop a common law prohibition against insider trading...from a general antifraud statute that does not even mention insiders, inside information, insider trading, or misappropriation." Richard W. Painter et al., *Don't Ask, Just Tell: Insider Trading After* United States v. O'Hagan, 84 VA. L. REV. 153, 211 (1998); *id.* & n.241-43 (discussing laws in UK, Italy and Germany); Directive 2003/6/EC of the European Parliament and of the Council, 2003 O.J. (L 96) 16 (directing EU members to prohibit individuals from trading on "inside information," a defined term).

seven years after the 1934 Act was passed and nineteen years after the SEC promulgated the rule." Stephen Bainbridge, *The Insider Trading Prohibition: A Legal and Economic Enigma*, 38 U. FLA. L. REV. 35, 38 (1986).

The *Chiarella* Court was certainly unable to locate the text the government purports to have unearthed. It said: "Although the starting point of our inquiry is the language of the statute, §10(b) does not state whether silence may constitute a manipulative or deceptive device....[N]either the legislative history nor the statute itself affords specific guidance for the resolution of this case." 445 U.S. 222, 226 (1980) (citation omitted). Instead, the Court fashioned a narrow "disclose or abstain" rule for corporate insiders under §10(b) using SEC and lower-court case law. *Id.* at 227-30. Similarly, when *Dirks* created a tipping offense, the Court did not purport to find it anywhere in §10(b)'s text. The Court conceived the offense and its elements based on *Chiarella*, cases cited therein, secondary literature, and other non-legislative sources. *See* 463 U.S. at 654-64. Neither *Dirks*' personal benefit test nor the government's "corporate purpose" test are anywhere in §10(b).[3]

The government insists that tipping is "deception," U.S.Br.12, 33, but that is hardly self-evident. Many commentators, including advocates of strong insider trading regulation, have observed that

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[3] The government selectively quotes *Central Bank*, U.S.Br.46, but that opinion nowhere suggests that the tipping offense derives from statutory language.

insider trading "is not really fraud, even though we have chosen to call it fraud in order to preserve and embellish the useful message of investor protection." Donald C. Langevoort, *"Fine Distinctions" in the Contemporary Law of Insider Trading*, 2013 COLUM. BUS. L. REV. 429, 440 (2013); *see also* Pet.Br.22 & 56 n.13.[4]

2. Nor can legislative history rescue the government. The Exchange Act's drafters were aware of insider trading concerns, but chose to address them only via the §16(b) private civil remedy, and did not intend for §10(b) to proscribe insider trading. Pet.Br.21-22; Cuban.Br.4.

The government resorts to a handful of subsequent amendments and committee reports issued decades after the 1934 Act, none of which defines insider trading or remotely suggests congressional "endorsement" "that a tipper personally benefits by giving a gift." U.S.Br.29. The subsequent legislation merely expanded penalties for insider trading, clarified that the insider trading restrictions apply to Congress, and made other technical amendments. It mentions judicial insider trading jurisprudence, U.S.Br.29-31, but does not interpret it, let alone ratify *Dirks*' personal benefit test (or the government's revision). The reports are equally inapposite. They acknowledge "the lack of

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[4] *O'Hagan*, cited U.S.Br.33, is inapposite because it was not about tipping. The Court held that the defendant-misappropriator violated §10(b) because he himself traded. This was critical to the determination that the deceptive conduct occurred "in connection with the purchase or sale of [a] security," as §10(b) requires. 521 U.S. at 656.

consensus over the proper delineation of an insider trading definition." H.R. REP. NO. 100-910, at 11 (1988). And the reports emphasize and quote *Dirks*' pecuniary gain language without even mentioning the "gift" language. *See id.* at 9; H.R. REP. NO. 98-355, at 15 (1983).

Any "interpretation given by [a later] Congress (or a committee or Member thereof)" would be irrelevant to the intent of the Congress that enacted §10(b) anyway. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994) (quotation marks omitted). "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 484-85 (1997) (quotation marks omitted). Indeed, *Central Bank* dismissed out-of-hand a similar claim about aiding and abetting, holding that the "acquiescence doctrine" has serious "limitations as an expression of congressional intent," 511 U.S. at 186, and "deserve[s] little weight in the interpretive process," *id.* at 187. "[W]hen...Congress has not comprehensively revised a statutory scheme but has made only isolated amendments,...[i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the Court's statutory interpretation." *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) (quotation marks omitted).[5]

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[5] *Herman & MacLean v. Huddleston* observed in dicta that Congress "comprehensively revised the securities laws in 1975" without disturbing the judicially implied §10(b) private action. 459 U.S. 375, 385-86 (1983). The 1975 overhaul represented

Even if the legislative history clearly supported the government's argument, that would not justify creating a tipping crime out of statutory language that says nothing about insider trading. As Chief Justice Marshall stated, "[t]o determine that a case is within the intention of a statute, its language must authorize us to say so." *United States v. Wiltberger*, 18 U.S. 76, 96 (1820). The rule of lenity would trump any "indications in the statute's legislative history" supporting a harsher interpretation. *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994).

* * *

Common-law doctrines about fiduciary and agency loyalty (U.S.Br.21-23) are equally irrelevant. *Santa Fe* expressly rejected the notion that any breach of fiduciary duty violates §10(b); *Dirks* and *Chiarella* reaffirmed that holding. The Court's more recent decisions reinforce the irrelevance of common-law doctrines. In *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, the Court held that "Section 10(b) does not incorporate common-law fraud into federal law." 552 U.S. 148, 162 (2008). In *Chadbourne & Parke LLP v. Troice*, the Court

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(continued...)

"the most searching reexamination of the competitive, statutory, and economic issues facing the securities markets, the securities industry, and, of course, public investors, since the 1930's." H.R. REP NO. 94-229, at 91 (1975). Here, by contrast, the government cites a few minor tweaks—not a comprehensive reexamination that could signify an implicit ratification of a judge-made test that the legislation did not address.

refused to construe "the phrase 'in connection with' so broadly as to convert any common-law fraud that happens to involve securities into a violation of §10(b)." 134 S. Ct. 1058, 1069 (2014) (quotation marks omitted).

C. The Government Dodges The Vagueness Problem By Changing Its Position

The government has waived its new argument that "benefit" means "purpose." *See Brumfield v. Cain*, 135 S. Ct. 2269, 2282 (2015). It previously conceded it had to prove a personal benefit, but argued that a tip to a friend or relative proved a "gift," which supposedly was a benefit to the tipper. Pet.Opp.13; Answer to Appellant's Supp. Br. at 8 (9th Cir. Dkt. No. 40-1); Proposed Jury Instructions at 39, 42 (N.D. Cal. Dkt. No. 80); *accord* Pet. for Writ of Cert., *United States v. Newman*, No. 15-137, at 18.

The apparent reason for the government's about-face is that its original gift/relationship theory (the Ninth Circuit's standard) violates due process. That theory is indeterminate because it fails to provide clear guidance on what relationships are sufficiently close, and what disclosures qualify as gifts. Pet.Br.40-44. As the Securities Industry and Financial Markets Association explains, its members "distill vast quantities of information" from many sources including company officers and employees. They need "clear and predictable" insider trading rules because the post-*Dirks* regime has led to "unpredictability and uneven application of the insider trading laws." SIFMA.Br.6, 8, 10, 11.

The government presumably devised its new lack-of-corporate-purpose test to overcome these serious due process problems. The only way it can resolve them without conceding that personal benefit must be narrowly defined is to make *all* tipping-and-trading criminal. For instance, if "corporate purpose" is the touchstone instead of "personal benefit," there is no need to ask which psychic or emotional benefits are sufficient. U.S.Br.41. Nor is there any need to assess the relationship between the tipper and tippee, because any—or even no—relationship will suffice. U.S.Br.27-28.[6]

The government's argument is profoundly wrong. *Dirks* did not enact a broad ban on "insider trading." It expressly reaffirmed *Chiarella*'s rejection of this very idea; held that "only some persons, under some circumstances, will be barred from trading while in possession of material nonpublic information," 463 U.S. at 657; and announced the personal benefit test to demarcate what trading violates §10(b). Jettisoning that

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[6] The scienter standard provides cold comfort. The government's assurance that "knowledge that the insider breached a fiduciary duty by disclosing material, nonpublic information for a personal benefit" is "a significant limitation on tippee liability," U.S.Br.44, rings hollow if "personal benefit" has no circumscribed meaning. Under its proposal, the government can simply argue that remote tippees always know their conduct is wrongful because there is no valid corporate purpose for disclosing material nonpublic information. This is exactly what the government contended in past efforts to water down personal benefit. *E.g.*, *United States v. Newman*, 773 F.3d 438, 454 (2d Cir. 2014) (government argued defendants "knew the insiders disclosed the information 'for some personal reason rather than for no reason at all'").

holding in favor a new, more expansive test would subvert the constitutional avoidance canon, which requires a "limiting construction"—not a broadening one. *Skilling v. United States*, 561 U.S. 358, 405 (2010).

II. THE GOVERNMENT'S BRIEF CONFIRMS THE NEED TO NARROWLY CONSTRUE PERSONAL BENEFIT

The government seeks unbounded license to prosecute people for trading with an informational advantage. Its present stance, like similar past efforts, shows why the Constitution commits the power to define crimes to the legislature, and why it requires Congress to provide clear notice about what conduct is barred. Because of these constitutional principles, this Court has repeatedly rebuffed analogous attempts to construe other broadly worded statutes expansively. The need for a narrow construction is even greater here, because §10(b) does not expressly prohibit *any* insider trading. The common-law development of insider trading law has lacked coherence because Congress has not made the policy choices necessary to provide clear guidance. Until Congress does so, this judicially created crime should be narrowly construed, with personal benefit defined as pecuniary gain.

1. The government's brief illustrates why it should not be given *carte blanche* to enforce a constantly evolving common law of insider trading. Its brief is the latest incarnation of a decades-long campaign to usurp the power to determine, *post hoc*, when investors can trade on informational

advantages. In the 1960s, the government tried to convert §10(b) into a broad ban on insider trading. This Court spurned that effort in *Chiarella*. Undeterred, the SEC tried to resurrect the parity-of-information rule, only to be rebuffed again in *Dirks*. After *Dirks*, the government still resisted this Court's careful limits on insider trading liability. It continued to pursue an ever-expansive vision of insider trading proscriptions. It charged individuals who merely overheard confidential information;[7] invented entire new categories of supposedly fiduciary relationships;[8] argued that the fact of a tip proved a personal benefit and charged remote tippees who knew nothing about why the insider disclosed;[9] and claimed that any relationship, however slight, between tipper and tippee proved a personal benefit.[10] This assumption of authority was largely unchecked by compliant lower courts until the Second Circuit pushed back in *Newman*.

To maintain its broad *de facto* authority to decide after-the-fact what is illegal, the government has resisted legislation that would clearly define the

[7] *SEC v. Switzer*, 590 F. Supp. 756 (W.D. Okla. 1984).

[8] *E.g.*, *United States v. McGee*, 763 F.3d 304 (3d Cir. 2014) (members of Alcoholics Anonymous); *United States v. Chestman*, 947 F.2d 551 (2d Cir. 1991) (uncle-in-law and nephew-in-law); *SEC v. Conradt*, 947 F Supp. 2d 406 (S.D.N.Y. 2013) (friends who showed each other work emails); *United States v. Willis*, 737 F. Supp. 269 (S.D.N.Y. 1990) (psychiatrist-patient); *United States v. Reed*, 601 F. Supp. 685 (S.D.N.Y. 1985) (father-son).

[9] *E.g.*, *Newman*, 773 F.3d at 453-55; *see* Payton.Br.11-12.

[10] *See* cases cited Pet.Br.47-48.

insider trading offense. It has opposed enactment of an insider trading statute that would tell the public in plain terms what is legal, and what is not. In the 1980s, for instance, the SEC advocated greater penalties for insider trading, but opposed a statutory definition to maintain maximum flexibility to determine *ex post* whether insider trading was wrongful. *See generally* Harvey L. Pitt & Karen L. Shapiro, *Securities Regulation by Enforcement: A Look Ahead at the Next Decade*, 7 YALE J. ON REG. 149, 207, 224 n.317 (1990). The SEC opposed any bright-line rule because it would provide savvy investors with guidance on how to trade legally using nonpublic information. *Id.* Its explicit goal, in other words, was to prevent citizens from having crimes defined with "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Skilling*, 561 U.S. at 402 (quotation marks omitted). This also may explain why it has not promulgated a rule defining insider trading.

2. The government's brief is just the latest iteration of this campaign to control what insider trading is criminal. But the Constitution forbids boundless prosecutorial (or judicial) discretion to define a crime after the defendant's conduct has occurred. Penal statutes must define offenses with "sufficient definiteness" to prevent such "arbitrary and discriminatory enforcement." *Id.* at 402-03.

In part to ensure clear limits on penal sanctions, the Constitution prohibits common-law crimes. "[T]he legislature, not the Court,...is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. at 95. "[B]efore one can be

punished, it must be shown that his case is plainly within the statute." *Fasulo v. United States*, 272 U.S. 620, 629 (1926). This Court has been particularly mindful of separation-of-powers concerns when interpreting §10(b), and has narrowly construed the statute in private actions, which were also judicially created. Pet.Br.37-39. A narrow construction of personal benefit is a constitutional imperative.

The familiar history of "honest services" fraud provides an instructive analogue. There too the government repeatedly attempted to deploy broad, seemingly indeterminate language to usurp the power to define the crime—until this Court held it in check. After 1909, the mail fraud statute criminalized schemes or artifices "to defraud" or "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *McNally v. United States*, 483 U.S. 350, 358 (1987). The government asserted that the statute covered schemes to deprive the public of the intangible right to have public officials perform their duties honestly. It therefore wielded the statute as a broad anti-corruption measure, even where the victim (the public) suffered no tangible loss. *Skilling*, 561 U.S. at 400-01.

The Courts of Appeals accepted the government's expansive view, *id.* at 401, but this Court disagreed. The Court applied the rule of lenity, and construed the statute narrowly. *McNally*, 483 U.S. at 359-61. The Court emphasized that Congress must speak "in clear and definite language," and refused to abide a construction that

"leaves its outer boundaries ambiguous." *Id.* at 360. The Court therefore read the statute as "limited in scope" to the protection of property rights. *Id.*

In response to *McNally*, Congress amended the statute to include fraudulent schemes for deprivation of "the intangible right of honest services." 18 U.S.C. §1346. The government persuaded the Court of Appeals that §1346 made any "undisclosed self-dealing by a public official or private employee" a federal crime. *Skilling*, 561 U.S. at 409. The Court once again disagreed. Acknowledging the "force" of Skilling's vagueness challenge, the Court narrowed the statute to the pre-*McNally* "core" of bribes and kickbacks to avoid striking it down as unconstitutional. *Id.* at 405-09.

Even after *Skilling*, the government sought to invoke honest services fraud as an unbounded anti-public-corruption tool. It argued in a bribery prosecution that "nearly anything a public official accepts—from a campaign contribution to lunch—counts as a *quid*; and nearly anything a public official does—from arranging a meeting to inviting a guest to any event—counts as a *quo*." *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016). The Court rejected that view. Invoking constitutional avoidance again, the Court adopted a limiting construction of what counts as a sufficient "official act." *Id.* at 2371-73. The Court reasoned that the government's interpretation "is not confined to cases involving extravagant gifts or large sums of money, and we cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *Id.* at 2372-73 (quoting *United States*

v. Stevens, 559 U.S. 460, 480 (2010)). A statute "that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *Id.* at 2373 (citation omitted).

3. The need for a scalpel is even greater here, because §10(b) does not mention insider trading or define its elements. This is not an ordinary case where "a court interprets or applies...a statute as written." U.S.Br.47. The government cannot sweep away constitutionally derived interpretive principles by pretending that §10(b) directly speaks to the question presented, when it obviously does not.

When Congress expresses policy choices through legislation, courts can perform their proper role, which is to "interpret" that legislation, "not to make policy." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). Here the words of §10(b) shed no light, and no statute provides direction. The issue is the meaning of an earlier Court decision (*Dirks*), which was interpreting another decision (*Chiarella*), which found no guidance in the statute, its legislative history, or the SEC's implementing rule, and instead cited lower-court and administrative decisions to fashion a narrow proscription on certain conduct that the Court thought should be barred by the statute.

4. There is much disagreement among regulators, judges, and scholars about what harms insider trading causes, if any, and how it should be regulated, and the answers are not as clear-cut as

the government suggests.[11] Congress is responsible for making these policy choices, but it has never identified the social harm from insider trading or expressed a policy reason for prohibiting it. Its failure to provide this critical policy guidance has made it more difficult for courts to perform their proper role. Consequently, insider trading law has developed in a haphazard (and not entirely coherent) manner. *See, e.g.*, Jill E. Fisch, *Start Making Sense: An Analysis and Proposal for Insider Trading Regulation*, 26 GA. L. REV. 179 (1991); Painter, 84 VA. L. REV. at 163-87.

The government's new theory invites more of the same. It could lead to results inconsistent with its suggested policy rationales for regulating insider trading. The government's proposal turns on whether a disclosure is for a corporate purpose. But corporations may determine that using confidential corporate information to trade *is* in the corporation's interest. Corporate officers might selectively leak information to favored investors, influential analysts, or others likely to trade—perhaps to cushion the impact of a forthcoming negative

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[11] Painter, 84 VA. L. REV. at 219-20; *see also* Stanislav Dolgopolov, *Insider Trading*, *in* THE CONCISE ENCYCLOPEDIA OF ECONOMICS 276-80 (David R. Henderson ed., 2d ed. 2007) (surveying scholarly literature for and against insider trading regulation). For instance, empirical work demonstrates that insider trading makes markets more efficient by enabling stock prices to reflect relevant information sooner, and contradicts government claims that insider trading undermines market integrity and investor confidence. Dolgopolov at 278-79. For additional sources disagreeing with the government's policy arguments, *see* Cuban.Br.11-12; Cato.Br.16-19; Pet.Br.27n.7.

earnings announcement.[12] Or a corporation could adopt a policy permitting a new CEO to trade on inside information as part of the compensation package, making insider trading an emolument of corporate office. The government's corporate purpose test does not satisfy concerns for the integrity of the markets, investor confidence, or the unfairness of traders using information not accessible to others.

5. Unless Congress decides the reasons for regulating insider trading and enacts a statute identifying its elements, courts lack the appropriate tools to implement the will of Congress. *See generally* Hervé Gouraige, *Do Federal Courts Have Constitutional Authority to Adjudicate Criminal Insider-Trading Cases?*, 69 RUTGERS L. REV (forthcoming Dec. 2016). That is why the Court should narrowly construe the personal benefit requirement.

The pecuniary gain standard is the appropriate limiting rule. It provides clear guidance that enables investors to determine whether their trading is legal based on objective facts, as *Dirks* instructed. 463 U.S. at 663. The pecuniary gain standard is more faithful to *Dirks*' emphasis on "gain," "profit," and benefit to the tipper; its reliance on lower-court and administrative decisions where insiders exploited confidential information for money; and this Court's other insider trading

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[12] This routinely occurs at some companies even though in some circumstances it might violate Regulation FD. *E.g.*, *Newman*, 773 F.3d at 454-55.

precedents. Pet.Br.29-33. A financial motive test is also supported by decisions interpreting other statutes, where the Court has required a showing that the alleged fraudster acted to obtain money or property *for himself*. Pet.Br.33-34. The government sidesteps that common thread and argues that *the victim's* loss need not be tangible, U.S.Br.36, but that is beside the point.

6. Petitioner was sent to prison for a common-law crime. The government has unabashedly endorsed this common-law process for years and continues to do so. The SEC's Chair recently testified in favor of retaining "the common law"; as one Member of Congress aptly responded, "[I]f we are talking about sending people to jail for long periods of time, it is probably better that [Congress] do[es] that." *Examining the SEC's Agenda, Operations, and FY 2016 Budget Request: Hearing Before the H. Comm. on Fin. Servs.*, 114th Cong. 39-40 (2015).

"It is one thing to recognize that some degree of uncertainty exists whenever judges and juries are called upon to apply substantive standards established by Congress; it would be quite another thing to tolerate the arbitrariness and unfairness of a legal system in which the judges would develop the standards for imposing criminal punishment on a case-by-case basis." *United States v. Kozminski*, 487 U.S. 931, 951 (1988). Yet that is precisely how insider trading law has developed for the past 36 years. It is a "judicial oak which has grown from little more than a legislative acorn." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737

(1975). The Court should refrain from further judicial expansion of criminal §10(b) liability, unless and until Congress expressly authorizes it.

III. SALMAN'S CONVICTIONS SHOULD BE REVERSED

The government does not even try to defend Petitioner's convictions under the pecuniary gain standard, and it is indisputable that Maher Kara had no financial motive for disclosing the information. That is why the district court found that Maher "did not engage in this conduct for self-benefit, [and] did not gain anything," and the SEC concluded that Maher should not be permanently barred from the securities industry Pet.Br.5 & n.1-2.

The judgment cannot stand under the novel lack-of-corporate-purpose approach either, because the jury was never asked to consider this theory, which the government has argued for the first time in its merits brief to this Court. The Court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury." *Chiarella*, 445 U.S. at 236. Doing so "offends the most basic notions of due process," even if the "jury might...have reached the same verdict" on the new theory. *Dunn v. United States*, 442 U.S. 100, 106-07 (1979).[13]

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[13] There is also no legal basis to expand the tipping crime to cover "remote tippees" who have not participated in the tipper's breach of duty. The government does not dispute Salman's lack of involvement in the breach and offers no meaningful response to Petitioner's authorities. *See* Pet.Br.58-61. Neither *Dirks* nor

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Profiting from inside information is unsavory and perhaps immoral. But no one should be sent to prison for conduct that Congress did not clearly criminalize. As this Court recently observed in a similar context:

> [T]his case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute. A more limited interpretation...leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.

McDonnell, 136 S. Ct. at 2375. The same is true of §10(b), a statute that does not address, much less prohibit, Petitioner's conduct:

> Depending on the circumstances, and even where permitted by law, one's trading on material nonpublic information is behavior that may fall below ethical standards of conduct. But in a statutory area of the law such as

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(continued...)

Bateman Eichler (cited U.S.Br.43) addresses remote tippees, and both cases state that tippees must directly participate in a fiduciary breach and are less culpable than tippers.

> securities regulation, where legal principles of general application must be applied, there may be significant distinctions between actual legal obligations and ethical ideals.

Dirks, 463 U.S. at 661 n.21 (quotation marks omitted).

Dirks' tipping crime should be confined to disclosures motivated by pecuniary gain. Any broader construction would violate the Constitution.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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